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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: LIN-02-093-50394

Office: Nebraska Service Center

Date: JAN 24 2003

IN RE: Petitioner:
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a start-up engineering and consulting services business with one employee and a projected gross annual income of \$200,000 for the year 2002. It seeks to employ the beneficiary as its human resources manager for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel submits a brief and additional documentation.

Section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" as:

an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

The director determined that the petitioner's level of business activity did not require the services of a human resources manager.

On appeal, counsel asserts that the petitioner's level of business activity is sufficient to require the services of a human resources manager. In support of his argument, counsel submits an organizational chart showing that the petitioner now has three employees, not including the beneficiary; the petitioner's articles of incorporation and bylaws; financial projections for the years 2002-2006; a quarterly report of the petitioner's business promotion efforts; and documentation from Bank One showing that Global Resources has a corporate bank account at that bank.

Counsel also submits documents showing that the petitioner has entered into contractual agreements with three different companies for consulting services. In view of the foregoing, it is concluded that the petitioner's level of business activities is sufficient to warrant the hiring of a full-time human resources manager.

The director further determined that the petitioner had failed to submit sufficient evidence to demonstrate that the duties of the proffered position are so specialized or complex that a baccalaureate degree in a specific specialty is required for the successful performance of the duties.

On appeal, counsel argues that the duties of the job being offered to the beneficiary are complex and require the theoretical and practical application of a body of highly specialized knowledge to fully perform the duties of the position.

The Service does not rely solely on the title of a position in determining whether that position qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. In an attachment to the initial I-129 petition, the petitioner provided the following breakdown of the duties and the percentage of the beneficiary's time to be spent on each duty:

- * Oversee the hiring and separation of employees - 15%
- * Handle the company's employee benefits program, notably its health insurance and pension plans - 15%
- * Match employees with qualified job seekers - 25%
- * Maintain network and databases required as part of the system - 15%
- * Occupational safety and health standards and practices - 10%
- * Conduct and supervise training and development programs for employees - 10%;
- * Orientation sessions and arrange on-the-job training for new employees
- * Conduct and supervise training and development programs for employees [and]
- * Develop and coordinate personnel programs and policies - 10%

To qualify the offered position as a specialty occupation, the petitioner must establish that:

1. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
2. The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
3. The employer normally requires a degree or its equivalent for the position; or
4. The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. 214.2(h) (4) (iii) (A).

The petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

The proffered position appears to combine the duties of a human resources manager with those of an office and administrative support worker manager. A review of the Department of Labor's (DOL) Occupational Outlook Handbook (Handbook), 2002-2003 edition, at pages 60-61, finds no requirement of a baccalaureate or higher degree in a specific specialty for employment as a human resources manager. Some employers prefer applicants who have majored in human resources, personnel administration, or industrial or labor relations while others look for a technical or business background or a well-rounded liberal arts education.

Additionally, the Handbook at page 418, does not list a requirement of a baccalaureate degree in a specific specialty for employment as an office and administrative support worker manager. Most businesses fill administrative and office support supervisory and managerial positions by promoting clerical or administrative support workers within their organizations. In addition, certain personal qualities such as strong teamwork and problem solving skills and a good working knowledge of the organization's computer system are often considered as important as a specific formal academic background.

Counsel's argument that the petitioner should be allowed to determine the minimum education requirements needed to fill the

proffered position in light of its own business and employment needs is not persuasive. While counsel asserts that the holding reached in Unico American Corp. v. Watson, CV No. 896958 (C.D. Cal. Mar. 19, 1991), dictated such an outcome in this particular case, the position at issue in the cited decision was that of a computer programmer, a position that can be readily distinguished from the proffered position of human resources manager in this case. Counsel has not demonstrated that the cited decision is relevant to the facts and issues of this proceeding.

The petitioner has not provided any evidence that it requires a baccalaureate degree in a specific specialty for the proffered position. Counsel argues that the petitioner expects its level of business activity to expand considerably and needs the services of a human resources manager in order to facilitate that expansion by recruiting more qualified individuals to serve as consultants. However, counsel's reasoning is problematic when viewed in light of the statutory definition of specialty occupation. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. As with employment agencies as petitioners, the Service must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. Cf. Defensor v. Meissner, 201 F.3d 384 (5th Cir. 2000).

The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if the Service was limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. See id. at 388.

In this case, the proffered position of human resources manager does not meet the statutory definition of specialty occupation. The position does not require the theoretical and practical application of a body of highly specialized knowledge. Therefore, even though counsel argues that the petitioner requires a bachelor's degree in specific field of study for employment in the offered job, such a requirement appears to be the petitioner's preference rather than an indication that the position is a specialty occupation requiring a bachelor's degree in a specific specialty.

The petitioner has not provided any documentation to show that the requirement of a baccalaureate degree in a specific specialty is common to the industry in parallel positions among similar organizations.

Finally, counsel contends that the proffered position can be considered professional based on the complexity of the duties alone. Counsel cites the holding reached in American Biotech, Inc. v. INS, F. Supp. (E.D. Tenn. March 27, 1989), in support of this argument. Counsel further argues that the petitioner's size and the scope of its business activities should not be determinative factors in considering whether the duties of the offered job are professional in nature. In support of this assertion, counsel cites the holding reached in Young China Daily v. Chappell, 742 F. Supp. 522 (N.D. Cal. 1989). However, these decisions dealt with membership in the professions, not membership in a specialty occupation. While these terms are similar, they are not synonymous. The term "specialty occupation" is specifically defined in section 214(i) of the Act. That statutory language effectively supersedes the cited decisions. As noted above, the Handbook does not provide any indication that a baccalaureate degree in a specific specialty is required for employment as a human resources manager or an office and administrative support worker manager. The record does not contain any independent evidence which would tend to support counsel's contention. Consequently, the petitioner has failed to establish that the nature of the beneficiary's proposed duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the decision of the director will not be disturbed.

ORDER: The appeal is dismissed.